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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: RetroTEC, Inc.

File: B-255346

Date: February 22, 1994

Henry E. Cathers, for the protester.
Stock America Inc., an interested party.
Stanley Braverman, Esq., Department of Defense, for the agency.
Jonathan H. Barker, Esq. and Robert G. Crystal, Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Specification for rotary retort required equipment to comply with all applicable Food and Drug Administration (FDA) regulations. Protest based on allegation that awardee's product fails to comply with FDA and United States Department of Agriculture (USDA) regulations is dismissed because it concerns the agency's affirmative determination that a bidder is responsible. Absent a showing of possible fraud or bad faith on the part of the contracting agency or that definitive responsibility criteria in the solicitation were misapplied, GAO will not review protests based on such allegations.

2. Protest based on allegation that awardee's rotary retort fails to comply with FDA and USDA regulations is dismissed because it raises issues concerning contract administration which GAO will generally not review. 4 C.F.R. § 21.3(1).

DECISION

RetroTEC, Inc., protests the award of a contract to Stock America, Inc., under request for proposals (RFP) No. DLA13H-93-R-2079, issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA) for rotary retorts. The protester argues that the awardee was non-responsive to the terms and conditions of the solicitation.

We dismiss the protest.

The solicitation was for the procurement of rotary retort vessels, food processing equipment used by the Armed Forces to heat, sterilize and preserve food under field conditions.

The protester is essentially arguing that the awardee is non-responsive because its product violates certain FDA and USDA regulations. It notes that the specifications require that the rotary retort "comply with all applicable Food and Drug Administration regulations for high-temperature/short-time process requirements," and that "a computer generated record shall be printed by the host computer in lieu of a human manual retort operator record." RetroTEC cites a USDA regulation, 9 C.F.R. § 318.307(b), which requires USDA approval of certain automated process monitoring and recordkeeping systems. RetroTEC then concludes that the awardee was "non-responsive " because Stock America"s retorts do not generate automated process monitoring and recordkeeping reports which have been accepted by the FDA or approved by the USDA.

The agency states that this USDA requirement, found in 9 C.F.R. § 318.307(b), does not, in fact, apply to this contract. In its view, the required approval of recordkeeping technique is a separate matter which is primarily the responsibility of the user of the equipment, not the supplier. The awardee has submitted a letter from the USDA Food Safety and Inspection Service which supports this agency view.

Notwithstanding the protester's assertion to the contrary, he does not raise issues of the awardee's responsiveness, but rather raises issues of the awardee's responsibility and of contract administration, both of which, under our regulations cited below, we do not review. The specification for rotational retorts called for brand name or equal and the awardee offered the brand name. It took no exceptions in its offer to the terms of the solicitation (i.e. it offered the model called for in the solicitation and did not otherwise modify it).

In substance, RetroTEC asserts that the awardee will not be able to provide retorts which comply with all applicable FDA regulations. A contractor's ability to perform is a matter of responsibility to be determined by the agency. A determination that a firm is capable of performing a contract is based, in large measure, on subjective judgments which are generally not susceptible to reasoned review. Thus, an agency's affirmative determination of a firm's responsibility will not be reviewed by our office absent a showing of possible fraud or bad faith on the part of procurement official, or that definitive responsibility criteria in the solicitation may have been misapplied. 4

C.F.R.§ 21.3(m)(5). Coastal Electronics, Inc., B-250718, February 16, 1993, 93-1 CPD ¶ 144.

Further, even if we were to consider the question of whether the regulations the protester cites requiring FDA approval, are applicable to the awardee, and concluded that they were, we would still not consider this protest on the merits. Whether the awardee does or does not comply with the FDA regulations is a matter of contract administration, which under our regulations, we generally do not consider. 4 C.F.R. § 21.3(m)(1)(1992). Louisville Coller Manufacturing Company, B- 243546, June 13, 1991, 91-1 CPD 568.

The protest is dismissed.

for Robert P. Murphy
Acting General Counsel